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IN THE

Supreme Court of the United States

October Term, 1992

STEVEN BROSTOFF,

Petitioner,

- against -

HON. CAROL BERKMAN,

Respondent.

PETITION AND APPENDIX FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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June 29, 1992

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QUESTIONS PRESENTED

1. Whether the Due Process Clause requires that a court order be subject to constitutional review in a criminal contempt proceeding when the order disobeyed has but a "frivolous pretense to validity" because it is issued arbitrarily and capriciously for an illegitimate purpose?

2. Whether the right to an impartial tribunal protected by the Due Process Clause requires reversal of a criminal contempt finding imposed by a judge summarily, and solely to indulge her personal antipathy toward the putative contemnor rather than to vindicate a public purpose?

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IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1992

STEVEN BROSTOFF,

Petitioner,

- v. -

HON. CAROL BERKMAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To the Honorable Chief Justice and the Associate Justices of the Supreme Court:

PRELIMINARY STATEMENT

Steven Brostoff seeks a writ of certiorari to review a March 31, 1992 order of the Court of Appeals of the State of New York.

OPINIONS BELOW

The memorandum opinion of the New York Court of Appeals, dated March 31, 1992, is reported at 79 N.Y.2d 938, 582 N.Y.S.2d 989, 591 N.E.2d 1175 (App. 1-3). The memorandum opinion of the Appellate Division, First Department of the Supreme Court of the State of New York is reported at 170 A.D.2d 364, 566 N.Y.S.2d 927 (App. 4-8). The dissenting opinion of the Hon. Joseph P. Sullivan is reported at 170 A.D.2d 366, 566 N.Y.S.2d 928 (App. 8-18).

JURISDICTION

The order of the New York Court of Appeals was entered on March 31, 1992. This Court's jurisdiction is being invoked under 28 U.S.C. § 1257 (a).

CONSTITUTIONAL PROVISION INVOLVED

Amendment XIV, Section 1, of the United States Constitution, provides, in pertinent part:

> ...nor shall any state deprive any person of life, liberty, or property, without due process of law....

STATEMENT OF THE CASE

A. The Summary Criminal Contempt Adjudication

On May 23, 1990, respondent Carol Berkman, an Acting Justice of the Supreme Court of the State of New York sitting in the County of New York, summarily found petitioner Steven Brostoff to be guilty of criminal contempt of court.[1] According to Justice Berkman, Mr. Brostoff -- an assistant district attorney in the office of Robert M. Morgenthau, the District Attorney of New York County, who was at the time assigned to the office of the New York City Special Narcotics Prosecutor -- was guilty of criminal contempt for "disorderly, contumacious and insolvent [sic] behavior" in refusing to obey her order to leave the well of the courtroom in which she was presiding (App. 22-23).

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[1]The facts relating to the summary criminal contempt finding are drawn from the verified petition Brostoff filed to obtain review of that finding. The verified petition is reproduced in the Appendix hereto (App. 19-48). As discussed below, New York law requires that the facts alleged in the verified petition be deemed true.

Thereafter, pursuant to §§ 752 and 753 of New York's Judiciary Law and § 7803(3) of New York's Civil Practice Law and Rules, Brostoff commenced an original proceeding in the Appellate Division, First Department of New York State Supreme Court to obtain review of the summary criminal contempt finding (App. 20). In his verified petition, Brostoff contended, *inter alia*, that his federal constitutional right to due process had been violated on the ground that Justice Berkman had issued her order and then held him in contempt, not to further any public purpose, but arbitrarily and capriciously as a result of abiding animus against him personally and the Office of the Special Narcotics Prosecutor (App. 21, 23, 26, 29, 40, 46).

Brostoff supported his position that the order and the contempt finding were not motivated by a public purpose with an array of extraordinary allegations of fact. For example, the petition alleged that it was not only common and routine practice for prosecutors to enter the well of busy courtrooms like the one in which Justice Berkman presided,

but that neither before nor after May 23, 1990 had Justice Berkman ever restricted a prosecutor's access to the well or ordered a prosecutor out of the well (App. 22, 36, 40-41, 45). Further, even on the day after he was held in criminal contempt for not leaving the well, many individuals were in the well (including two casually clad men, apparently police officers, lounging in the jury box) and they were not directed to leave by Justice Berkman (App. 40-41). Moreover, prior to her unprecedented order to "[g]et out of the well" on May 23rd, Brostoff had not committed anything remotely like an interruption (App. 21, 37). Justice Berkman had herself interrupted the proceedings then occurring at the bench with her curtly-phrased command even though he was present on routine and proper business (App. 21, 35, 37). Indeed, although Justice Berkman did not have and could not have had the slightest idea why he was present, she nonetheless had purported to make the absurd finding that he in fact "ha[d] no business being in the well of the courtroom" (App. 23, 39-40).

The petition also alleged that Justice Berkman's antipathy toward Brostoff and the Office of the Special Narcotics Prosecutor stemmed from her disapproval of legitimate efforts by him and that office to obtain the cooperation of certain defendants charged with violating New York's narcotics laws (App. 21, 26). Commencing about February, 1990, Justice Berkman informed Brostoff that she would not allow narcotics defendants to cooperate with the authorities and advised him once that they could cooperate "over [her] dead body" (App. 21). Relatedly, the petition asserted that Justice Berkman had used a highly derogatory scatological epithet in referring to cooperating defendants (App. 27), pleaded specific instances in which she had unreasonably purported to forbid particular defendants from cooperating (App. 27-29, 31-32) and alleged that she had made disparaging references to the abilities of prosecutors in his office (App. 29).

In further support of the claim that the order and contempt finding were motivated by Justice Berkman's

animus toward Brostoff personally, the petition alleged that in the months preceding the summary criminal contempt finding Justice Berkman had berated Brostoff without cause and had made highly derogatory remarks about him to other prosecutors he supervised (App. 29-31). Indeed, immediately after holding him in contempt Justice Berkman referred to him, in a comment to another prosecutor, with another unseemly scatological epithet (App. 40).

In numerous other respects, the petition substantiated Brostoff's contention that on May 23, 1990, Justice Berkman had acted out of personal rancor and not to further any public purpose. For example, she had become incensed when she saw him in the well on account of an incident which had occurred just the day before (App. 37). On that day, Brostoff had approached the bench with a defense attorney for the purpose of making a ministerial request: they intended to request an order producing the attorney's client from prison so that he could be debriefed to determine if he possessed the kind of specific information which Justice

Berkman had indicated a defendant had to have before she might consider cooperation by a defendant. However, as soon as the general subject of cooperation was broached at the bench, Justice Berkman became irate. Erroneously and precipitously concluding that Brostoff's purpose was to ask her to approve cooperation by the attorney's client, she interrupted the proceedings and ordered him to leave the courtroom (App. 32-34).[2]

Justice Berkman did not file an answer admitting or denying the allegations of the verified petition. Rather, she moved to dismiss the petition pursuant to §§ 3211(a) (7) and 7804(f) of New York's Civil Practice Law and Rules on the ground that it failed to state a cause of action. Accordingly, for purposes of Justice Berkman's motion and the application of the petition to vacate the criminal contempt finding, New

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[2]In addition, the petition alleged that Justice Berkman's injudicious dudgeon in wielding her summary criminal contempt power was also evident from the fact that she repeatedly cut him off as he tried to explain himself immediately after she held him in contempt, and from the various ways she had distorted the record when his superior appeared before her the next day and protested the contempt finding (App. 39-43).

York law requires that the allegations of the petition be deemed to be true. *See, e.g., Stukuls* v. *State of New York*, 42 N.Y.2d 272, 275, 397 N.Y.S.2d 740, 366 N.E.2d 829 (1977).

B. The Appellate Division's Decision

On February 26, 1991, the Appellate Division, First Department denied Brostoff's application to vacate the summary criminal contempt finding and granted Justice Berkman's motion to dismiss the petition for failure to state a cause of action. The Appellate Division held that the contempt finding was justified on three separate statutory grounds: (1) "[d]isorderly, contemptuous, or insolent behavior" by Brostoff, (2) "[w]ilful disobedience" to Justice Berkman's order and (3) "[r]esistance wilfully offered" to that order. New York Judiciary Law § 750(A)(1), (3), (4). Without expressly so stating, the Appellate Division deemed irrelevant both Brostoff's contention that Justice Berkman had acted arbitrarily and capriciously on the basis of personal

antipathy in issuing her order that he "[g]et out of the well" and enforcing it by exercising her summary criminal contempt power, and the specific factual allegations with which Brostoff supported his contention. Thus, viewing Brostoff's allegations as irrelevant to the validity of Justice Berkman's order and summary criminal contempt finding, the Appellate Division held that "'[h]owever misguided and erroneous the court's order may have been, [Brostoff] was not free to disregard it and decide for himself the manner in which to proceed'" (App. 8) (quoting *Matter of Balter* v. *Regan*, 63 N.Y.2d 630, 631, 479 N.Y.S.2d 506, 468 N.E.2d 688 (1984)).

In a dissenting opinion, Justice Joseph P. Sullivan wrote that there was "no evidence in th[e] record that [Brostoff] acted in a contumacious or insolent manner" and that his response to Justice Berkman's "directive to '[g]et out of the well' . . . was reasoned and measured as he attempted to frame the issue in a professional rather than personal perspective" (App. 16). Observing that there were no

"circumstances -- other than [Justice Berkman's] personal animus -- which occasioned her directive" (App. 17), Justice Sullivan concluded that the directive "lost the character of a legal mandate" because it was "the culmination of a long smoldering antagonism" and "a personal response to [Brostoff's] mere presence" (App. 18). Thus, "the finding of contempt . . . constitute[d] a gross deviation from the judicial obligation of impartiality and was the result of an oppressive application of the contempt power" (App. 8).

C. The Court of Appeals' Decision

On March 31, 1992, the New York Court of Appeals issued a memorandum opinion affirming the Appellate Division. The court made no mention of Brostoff's contention that his federal constitutional right to due process had been violated because Justice Berkman, acting not to further any public purpose but out of an abiding personal animus against him and the office he represents, had issued an arbitrary and capricious order that he leave the well and

held him in summary criminal contempt when he did not comply with her vindictive command. Rather, with respect to the validity of Justice Berkman's "[g]et out of the well" order, the court wrote only that "[h]owever misguided and erroneous the court's order may have been, [Brostoff] was not free to disregard it and decide for himself how to proceed" (App. 2; internal quotations and citation omitted).[3]

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari for two reasons. First, this Court should resolve important issues concerning the scope of an awesome power, the judicial contempt power, as it affects fundamental constitutional liberties, issues which this Court was unable to reach in *United States* v. *Providence*

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[3]Given its conclusion that Brostoff was lawfully held in summary criminal contempt of court for "willfully refus[ing] to exit the well area after an explicit and unambiguous judicial order to do so ([New York] Judiciary Law § 750(A) (3) and (4))," the Court of Appeals did not address Brostoff's arguments that the contempt finding could not be upheld under New York Judiciary Law § 750(A)(1), punishing as criminal contempt "[d]isorderly, contemptuous, or insolent behavior. . . directly tending to interrupt [a court's] proceedings, or to impair the respect due to its authority."

Journal Co., 485 U.S. 693 (1988). Second, this Court should overrule the determination of the New York Court of Appeals, flouting this Court's precedents on the due process right to an impartial tribunal.

A

The Court of Appeals deemed irrelevant Brostoff's claim and supporting factual allegations that Justice Berkman acted arbitrarily and capriciously and was seeking to vindicate a private grudge, not a public purpose, in issuing her "[g]et out of the well" decree and exercising her summary criminal contempt power. The Court of Appeals merely stated "[h]owever misguided and erroneous [Justice Berkman's] order may have been, [Brostoff] was not free to disregard it and decide for himself the manner in which to proceed." App. 2. Thus, the Court of Appeals invoked the collateral bar rule, the "principle that court orders, even those that are later ruled unconstitutional, must be complied with until amended or vacated." *Matter of Providence Journal Co.*, 820 F.2d 1342, 1345 (1st Cir. 1986) (footnote

omitted), *modified*, 820 F.2d 1354 (1st Cir. 1987) (en banc), *cert. dismissed sub nom. United States* v. *Providence Journal Co.*, 485 U.S. 693 (1988).

The conclusion that the validity of an order cannot be challenged in a proceeding to review a criminal contempt finding even if the order disobeyed was an arbitrary and capricious command issued for an illegitimate purpose, presents a serious question which has not yet been passed upon by this Court. In *Walker* v. *City of Birmingham*, 388 U.S. 307 (1967), a bare majority of this Court did hold that the petitioners could not raise as a defense to their non-summary criminal contempt adjudications a claim that the injunction they disobeyed was unconstitutional under the First Amendment. However, the Court suggested that a different conclusion would obtain if the injunction "was transparently invalid or had only a frivolous pretense to validity." *Id.*, at 315.[4]

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[4]More recently, four members of this Court noted that *Walker* had "made clear that [it] was 'not a case where the injunction was (continued...)

In *Matter of Providence Journal Co., supra*, 820 F.2d 1342, a panel of the First Circuit relied on *Walker* and held that an order restraining a newspaper from publishing FBI logs and memoranda was "transparently invalid" under the First Amendment, and thus that the order's invalidity barred the criminal contempt finding imposed when the newspaper disobeyed the injunction. In support of its holding, the court stated that the key to the "transparently invalid" exception to the collateral bar rule "is the notion that although a court order -- even an arguably incorrect order -- demands respect, so does the right of the citizen to be free of clearly improper exercises of judicial authority." 820 F.2d at 1347. Sitting en banc, the First Circuit modified the panel's opinion and held that even those subject to a transparently unconstitutional

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[4](...continued)
transparently invalid or had only a frivolous pretense to validity,'" *Martin* v. *Wilks*, 490 U.S. 755, 790 n. 28 (Stevens, J., dissenting) (quoting *Walker*, *supra*, 388 U.S., at 315), and observed that "[c]ourts and commentators have relied on this reservation in positing that a contempt citation may be collaterally attacked if the underlying order was 'transparently invalid.'" *Id.*

order should "make a good faith effort to seek emergency relief from [an] appellate court." 820 F.2d 1354, 1355.

This Court granted certiorari, 484 U.S. 814 (1987), "[b]ecause of the importance of the issues," 485 U.S., at 698, but dismissed the writ for want of jurisdiction. *Id.*, at 699. This case now presents the opportunity to resolve those issues. To be sure, there is no First Amendment issue here. Rather, Brostoff's claim is that Justice Berkman's "[g]et out of the well" directive was constitutionally infirm because it violated his due process right to be free of arbitrary and capricious exercises of official authority. *See, e.g., Daniels* v. *Williams*, 474 U.S. 327, 331 (1986); *Sacher* v. *United States*, 343 U.S. 1, 29 (1952) (Frankfurter, J., dissenting). But the issues here are similar to those presented in *Providence Journal* in that both deal with the same important limitation on the collateral bar rule.

Indeed, in terms of "the right of the citizen to be freely of clearly improper exercises of judicial authority," *Matter of Providence Journal Co., supra*, 820 F.2d at 1347,

it is even more important in this case that this Court recognize the exception to the collateral bar rule for orders having "only a frivolous pretense to validity." *Walker*, *supra*, 388 U.S., at 315. One reason is that, unlike the Providence Journal, Brostoff was held in summary criminal contempt. A person held in summary contempt is denied fundamental due process protections by a rule of necessity -- the vindication of essential judicial functions -- which governs use of the summary contempt power. *Offutt* v. *United States*, 348 U.S. 11, 14 (1954); *Sacher* v. *United States*, 343 U.S., at 36 (Frankfurter, J., dissenting). When alleged contemnors are denied all these protections, it is all the more crucial that judges not be empowered to issue unreviewable orders and sanctions for capricious, private purposes. Moreover, the rule of necessity governing use of the summary contempt power obviously cannot justify a contempt imposed to vindicate a private grudge, and not the impersonal authority or dignity of the court.

Relatedly, the collateral bar rule does not apply to civil contempts and so the invalidity of a court's order can be raised as a defense to a civil contempt. *See, e.g., United States* v. *United Mine Workers*, 330 U.S. 258, 294-295 (1947); *Collins* v. *Barry*, 841 F.2d 1297, 1299-1300 (6th Cir.), *cert. denied*, 488 U.S. 826 (1988); *but see Alexander* v. *Chicago Park District*, 927 F.2d 1014, 1025 (7th Cir. 1991), *cert. denied sub nom.*, *Cook* v. *Illinois*, ___ U.S. ___, 117 L.Ed.2d 491 (1992). And the reason civil and criminal contempts are generally treated differently in this regard is precisely because civil contempts are not intended to vindicate public interests, but only the private interests of the litigants for whose benefit the orders are entered. *United Mine Workers*, *supra*, 330 U.S., at 294-295; *Collins* v. *Barry*, 841 F.2d at 1299-1300. Where, as here, the criminal contempt is imposed to indulge private interests of the judge, surely the civil rule permitting collateral review of the order disobeyed must be applied.

The *Walker* Court also indicated that the constitutional invalidity of the injunction might have been a bar to the contempt citation "if the petitioners, before disobeying the injunction, had challenged it in the Alabama courts, and had been met with delay and frustration of their constitutional claims." 388 U.S., at 318. Again unlike *Providence Journal*, the order to Brostoff was so immediate and peremptory as to preclude any opportunity -- prior to having to decide whether to comply -- to challenge the order before a different tribunal.

All this is not to deny the importance of judicial authority to preserve order and decorum in the courtroom or to punish violations of orders through the contempt power. However, this Court should recognize an important exception to the power of judges to enforce decrees without their validity being examined. And that exception is one which is important for reasons transcending the particular facts of this case. Here, the judge acted arbitrarily and capriciously out of personal animus. In other cases, judges might act

similarly on the basis of racial or sexual animus. To govern such situations, it is imperative that this Court recognize an exception to the collateral bar rule which will permit review of orders which are so invidiously motivated.

B

This is a case in which a judge gave an unprecedented order to an attorney solely to gratify the judge's personal antipathy toward him and then summarily held him in contempt when he failed to obey that order. Contrary to the Court of Appeals' decision, the judge's personal rancor toward the individual she held in summary criminal contempt was not irrelevant to Brostoff's due process rights. In this criminal contempt context, this Court should reaffirm the fundamental principle that due process is not satisfied when the judicial power is exercised by an individual with a personal interest in the outcome.

The unique potential for and history of abuse inherent in the summary contempt power is familiar ground. *See, e.g.*, *Bloom* v. *Illinois*, 391 U.S. 194, 202-208 (1968). And

in *Sacher* v. *United States*, *supra*, the Court acknowledged one of the reasons why "contempt power . . . is capable of abuse[:] Men who make their way to the bench sometimes exhibit vanity, irascibility, narrowness, arrogance, and other weaknesses to which human flesh is heir." 343 U.S., at 12. Partly because of this potential, "[s]ummary punishment always, and rightly, is regarded with disfavor and, if imposed in passion or pettiness, brings discredit to a court as certainly as the conduct it penalizes." *Id.*, at 8.

Accordingly, on several occasions this Court has reversed summary criminal contempt adjudications imposed by judges who had demonstrated personal hostility toward putative contemnors. Justice Frankfurter's opinion for the Court in *Offutt* v. *United States*, *supra*, is instructive. There, a judge summarily found an attorney guilty of criminal contempt for "contumacious, and unethical conduct in open court during the trial." 348 U.S., at 12. However, the interchanges between the court and the attorney cited by the court "were marked by expressions and revealed an attitude

which hardly reflected the restraints of conventional judicial demeanor." *Id.* After noting that the summary criminal contempt power is justified only by the "necessities of the administration of justice," Justice Frankfurter observed that "[t]he power thus entrusted to a judge is wholly unrelated to his personal sensibilities." *Id.*, at 14. Indeed, Justice Frankfurter wrote that:

> "the vital point is that in sitting in judgment ... the judge should not himself give vent to personal spleen or respond to a personal grievance. These are subtle matters for they concern the ingredients of what constitute justice. Therefore, justice must satisfy the appearance of justice. *Id.*
>
> * * *
>
> The record discloses not a mere flare-up, not a show of evanescent irritation - a modicum of quick temper that must be allowed even judges. The record is persuasive that instead of representing the impartial authority of law, the trial judge permitted himself to become personally embroiled with the petitioner." *Id.*, at 17.

See also Cooke v. *United States*, 267 U.S. 517, 539 (1925).

To be sure, the reversal in *Offutt* was based in part on this Court's supervisory authority over the lower federal

courts. But this Court has relied squarely on the due process right to an impartial judge in reversing many summary criminal contempt findings. *See, e.g., Taylor* v. *Hayes*, 418 U.S. 488, 501-503, & 503 n. 10 (1974); *Johnson* v. *Mississippi*, 403 U.S. 212, 215-216 (1971) (per curiam); *Mayberry* v. *Pennsylvania*, 400 U.S. 455, 465-466 (1971). And, the important concerns animating these summary contempt cases are equally applicable to the decisions by this Court in other contexts concerning the due process right to an impartial tribunal. *See, e.g., In re Murchison*, 349 U.S. 133, 136 (1955); *Tumey* v. *Ohio*, 273 U.S. 510, 532, 535 (1927).[5]

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[5]*See also Aetna Life Ins. Co.* v. *Lavoie*, 475 U.S. 813, 821-825 (1986) (litigant denied due process by appellate judge's involvement in resolution of issues on appeal in which judge had a "direct, personal, substantial [and] pecuniary" interest)(internal quotations omitted); *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 242 (1980) ("The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. The requirement of neutrality in adjudicative proceedings ... helps to guarantee that life, liberty or property will not be taken on the basis of erroneous or distorted conceptions of the facts or the law"); *Vasquez* v. *Hillery*, 474 U.S. 254, 263 (1986) (plurality); *Green* v. *United States*, 356 U.S. 165, 198-199 (1958) (Black, J., dissenting).

Solicitude for the right to an impartial judge should be particularly acute in summary criminal contempt. After all, in contrast to the core principle "diffus[ing] power the better to secure liberty," *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring), exercise of the summary contempt power entails a concentration of legislative, executive and judicial power. *Green* v. *United States*, 356 U.S. 165, 198-199 (1958) (Black, J., dissenting). Thus, whatever the precise contours of the due process right to a disinterested prosecutor,[6] the fundamental fairness considerations which require reversal on a sufficient showing

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[6]*See Marshall* v. *Jerrico, Inc.*, *supra*, 446 U.S., at 244-250 ("A scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions"); *Brotherhood of Locomotive Firemen & Enginemen* v. *United States*, 411 F.2d 312, 319 (5th Cir. 1969) (due process violated where interested person appointed to prosecute criminal contempt); *cf. Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 802-809 (1987) (exercising supervisory authority to hold that counsel for a party that is the beneficiary of a court order may not be appointed prosecutor in contempt proceeding based on violation of the order); *id.*, at 809-814 (plurality) (appointment of interested prosecutor undermines confidence in integrity of criminal proceeding and is error so fundamental that it is not subject to harmless error analysis).

of possible judicial bias, necessarily operate with even more force when the prosecutor and judge are one and the same, especially when the prosecutor-judge is animated by personal rancor. *Green* v. *United States*, *supra*, 356 U.S., at 198-199 (Black, J., dissenting); *Sacher* v. *United States*, *supra*, 343 U.S., at 28 (Frankfurter, J., dissenting).

In *Fisher* v. *Pace*, 336 U.S. 155 (1949), this Court divided sharply on the question of what the record demonstrated about the conduct of an attorney and the judge who held him in summary contempt. Justices Douglas and Black would have reversed the contempt finding believing that there was "only one fair inference from the record - that the judge picked a quarrel with this lawyer and used his high position to wreak vengeance on him." *Fisher* v. *Pace*, *supra*, 336 U.S., at 166 (Douglas, J., dissenting). Justice Douglas' words could have been written about this case. Bluntly put, the crux of Brostoff's claim is that Justice Berkman was out to get him because she despised him,

singled him out with an irrational order that she had never before and never since issued, and with evident satisfaction held him in summary contempt when he did not obey her capricious command. Unlike *Fisher* v. *Pace*, there can be no dispute here about the facts since the Court of Appeals viewed Brostoff's allegations as irrelevant. And in so concluding, that court blinked a gross violation of Brostoff's due process rights.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 29, 1992

APPENDIX

THE COURT OF APPEALS' DECISION

STATE OF NEW YORK
COURT OF APPEALS

No. 40

In the Matter of Assistant
District Attorney
STEVEN BROSTOFF,

Appellant,

v.

CAROL BERKMAN, Acting Justice of
the Supreme Court, New York County,

Respondent.

James M. McGuire, for appellant.
Abigail I. Petersen, for respondent.

MEMORANDUM:

The judgment of the Appellate Division should be affirmed, without costs.

Petitioner, an Assistant District Attorney, refused to obey respondent, an Acting Justice of Supreme Court presiding at a calendar call, when she ordered the prosecutor

to leave the well area of her courtroom. The verbal exchanges and actions that led the Justice to hold the prosecutor in summary criminal contempt are described in the Appellate Division writings (170 AD2d 364).

Petitioner's statements and conduct, as reflected in the record before us, satisfied the prerequisites for respondent's adjudication of summary contempt (*contrast*, *Matter of Williams v Cornelius*, 76 NY2d 542, 547). He willfully refused to exit the well area after an explicit and unambiguous judicial order to do so (Judiciary Law § 750[A][3], [4]). As this Court has noted in the past, "[h]owever misguided and erroneous the court's order may have been, petitioner was not free to disregard it and decide for himself the manner in which to proceed" (*Matter of Balter v Regan*, 63 NY2d 630, 631).

Petitioner's arguments that his due process rights were violated and that the mandate was defective under Judiciary Law § 752 are also without merit (*see*, *Matter of*

Kunstler v Galligan, 79 NY2d 775, *affg on App Div* 168 AD2d 146).

Chief Judge Wachtler and Judges Simons, Kaye, Alexander, Titone, Hancock and Bellacosa concur.

Judgment affirmed, without costs, in a memorandum.

THE APPELLATE DIVISION'S DECISION

NEW YORK SUPREME COURT
APPELLATE DIVISION: FIRST DEPARTMENT

In re Application of Assistant District Attorney **STEVEN BROSTOFF**,

Petitioner,

For a Judgment, etc.,

41821
[M-4248 & M-5242]

-against-

CAROL BERKMAN, Acting Justice of the Supreme Court, New York County,

Respondent.

Murphy, P.J., Sullivan, Carro, Milonas, Rubin, JJ.

Application pursuant to CPLR article 78 for a judgment vacating an order of the Supreme Court, New York County (Carol Berkman, J.), entered on May 23, 1990, summarily holding petitioner in contempt of court, is denied, the cross-motion granted and the proceeding dismissed, without costs or disbursements.

An examination of the transcript of the underlying proceedings demonstrates that respondent was clearly justified in summarily finding petitioner, an assistant district attorney, in criminal contempt of court. Indeed, petitioner acknowledges that his conduct was regrettable and that he should have complied with the Judge's command but insists that he did not act in a wilful or contumacious manner. Rather, he urges, the incident in question was the result of a misunderstanding between him and the court, which had consistently treated both him and the office which he represents with disparagement and antipathy. However, the fact remains that regardless of the Judge's attitude toward petitioner, there was simply no excuse for petitioner's lack of respect for the court and his refusal to abide by its lawful order. According to section 750 (A) of the Judiciary Law, a court is empowered to punish for criminal contempt a person who is guilty of, among other acts, the following:

"1. Disorderly, contemptuous, or insolent behavior, committed during its sitting, in its immediate view and

presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority. * * *

"3. Wilful disobedience to its lawful mandate.

"4. Resistance wilfully offered to its lawful mandate."

Punishment for contempt may be summary "[w]here the offense is committed in the immediate view and presence of the court" (Judiciary Law § 755; *see also, Matter of Katz v Murtagh*, 28 NY2d 234). In the instant situation, petitioner was not directed to remove himself from the courtroom; he was simply ordered from the well, an area in which it may well be disruptive to court proceedings to have persons carrying on conversations while cases are being heard. Yet, petitioner's response to the Judge's mandate that he leave the well was to announce insolently that "I have a right to be here. I am a deputy bureau chief of this bureau. I am entitled to check my cases." When the court repeated that he get out of the well and that his choice was either to sit in the audience or depart through the holding pens,

petitioner, in effect, taunted the court by stating that "I will go that way [indicating the pens]." Thus, it is evident that he not only deliberately disobeyed the court's command but his behavior was derisive of the court's authority. It appears that petitioner had not intention of complying with the court's lawful order even when he was confronted with the possibility of legal compulsion.

Certainly, the presiding Judge, not an assistant district attorney, possesses the authority to govern the functioning of the court. Moreover, it is the Judge's responsibility to uphold order and decorum in the court. In that connection, it is within the domain of the Judge to regulate what occurs in his or her courtroom, including activity in the well. If a Judge wishes to have the well cleared, that is his or her right, and neither defense counsel nor the prosecutor may ignore the court's direction in that respect. According to 22 NYCRR 604.1 (d) (7) an attorney is not relieved of his obligation to maintain a respectful attitude toward the court "by what he may regard as a

deficiency in the conduct or ruling of a judge". As the Court of Appeals has observed, "[h]owever misguided and erroneous the court's order may have been, petitioner was not free to disregard it and decide for himself the manner in which to proceed" (*Matter of Balter v Regan*, 63 NY2d 630, 631). Therefore, petitioner was unwarranted in challenging the propriety of the court's order; so long as it was lawful, he was obliged to obey. Petitioner's conduct was wilful, defiant, contemptuous and generally offensive, and, consequently, the summary finding of criminal contempt was fully supported by the record. Concur--Murphy, P.J., Sullivan [sic], Carro, Milonas and Rubin, JJ.

DISSENTING OPINION OF THE HON. JOSEPH P. SULLIVAN

Sullivan, J., dissents in a memorandum as follows: Since I am of the view that the finding of contempt in this case constitutes a gross deviation from the judicial obligation of impartiality and was the result of an oppressive application of the contempt power, I would grant the

petition, vacate the contempt adjudication and direct remittance of the fine.

Petitioner, an assistant district attorney in the office of the District Attorney of New York County, is the deputy chief of Trial Bureau 40/50 of the Office of the Special Narcotics Prosecutor. Respondent is an Acting Justice of the Supreme Court, New York County, who, during the pertinent period, presided over Part 50 in New York County, one of three arraignment and assignment parts in that county in which defendants indicted for felony offenses are arraigned and the part which receives indictments brought by prosecutors assigned to, *inter alia*, Trial Bureau 40/50 of the Special Narcotics Prosecutor's Office.

In his capacity as deputy bureau chief, petitioner had appeared before respondent from time to time in connection with his own cases and those of the prosecutors whom he supervises. During this period, the parties disagreed as to whether defendants who cooperated with the District Attorney's office should receive lenient treatment in

exchange for their cooperation. Respondent was, to say the least, unsympathetic to petitioner's efforts to obtain cooperation from defendants. On May 22, 1990, when petitioner asked to approach the bench on a particular case, respondent warned that "[i]t had better not be on your usual mission because if so I am going to have you removed from my courtroom and barred for all time. Do you still wish to approach?" After petitioner responded, "I think so," petitioner and defense counsel approached the bench and brought up a question regarding the cooperation of the defendant in that case. Respondent ordered petitioner to "get out of my courtroom I don't want you here." At that point, the matter was adjourned.

The following day, in the course of his regular duties, petitioner entered the well in respondent's courtroom during a bench conference on another matter, which was being handled by another assistant District Attorney. The following exchange took place between the parties:

"THE COURT: Get out of the well.

"MR. BROSTOFF: I have a right to be here. I am a deputy bureau chief of this bureau. I am entitled to check my cases.

"THE COURT: Get out of the well, you are not permitted to be in the well in my courtroom. Sit in the audience. You either step out that way [indicating the courtroom's public doors] or that way [indicating the door to the holding pens] Mr. Brostoff.

"MR. BROSTOFF: I will go that way [indicating the door to the pens].

"THE COURT: Very good, You're in contempt, would you like to call your bureau chief before you are sentenced?

"MR. BROSTOFF: No, your honor.

"THE COURT: Very good. I will hear you on sentence.

"MR. BROSTOFF: I don't think there is any reason not to allow me in this courtroom. It is just arbitrary and capricious. I don't think it is proper, nor is it fair. I have

every right to stand up on my cases and be here with my bureau.

"THE COURT: Mr. Brostoff, I asked you to step out of the well and you refused to do so. There is a case before the court, it is a New York County case, it is not your case.

"MR. BROSTOFF: I didn't approach.

"THE COURT: Excuse me Mr. Brostoff, this is not a dialogue. So, if you have a right to stand up on your cases you can sit in the audience. And wait until your case is called.--

"MR. BROSTOFF: Then --

"THE COURT: Excuse me, I am done with you. You said you wanted to be heard and you were heard. Please write up the mandate. He is fined 50 dollars or 3 days."

The "mandate" adjudging petitioner in contempt stated that he was found guilty of "disorderly, contumacious and insolvent [sic] behavior", in that, "having no business being

in the well of the courtroom, and having been ordered out of the well, he refused to leave on the court's order."

The next day, when assistant District Attorneys Robert Silbering and Mark Dwyer appeared before respondent and asked her to vacate the contempt order, she stated:

"I am glad you have given me the chance to expand on this record.

"The preceding day Mr. Brostoff came up on a case in this courtroom and he asked to approach with defense counsel. I told him if he wanted to approach on the same application that had been made many times before and rejected by the Court he should not do so, but if he chose to do so I did not want to see him again in my courtroom. He chose to step up and made the same application that had been made previously many, many times to the Court in the same case and I asked him to leave.

"Yesterday, the next day, the very next day, when I said, 'Do not come back to my court. [sic]', rather an

overstatement, I must say, I agree with you there, this being a public courtroom.

"Mr. Brostoff walked into my courtroom and into the well while a case was before the bench. I ordered him out of the well. He refused to go. I ordered him again to leave the well. He refused to go. He told me he was an assistant bureau chief and he could go wherever he liked in this court. I told him he had two choices; he could leave the well through the public door or through the pen door. He said he would leave through the pen door.

"When I held him in contempt it appeared he came to what we shall call his senses. So apparently my holding him in contempt did work to have him obey the mandate of the court."

"A court of record has power to punish for a criminal contempt, a person guilty of * * *

"1. [d]isorderly, contemptuous, or insolent behavior, committed during its sitting, in its immediate view and

presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority. * * * [or]

"3. [w]ilful disobedience to its lawful mandate." (Judiciary Law § 750[A]; *Matter of Katz v Murtagh*, 28 NY2d 234.)

While the contempt power is "a necessary and integral part of the independence of the judiciary" (*Gompers v Bucks Stove & Range Co.*, 221 US 418, 450), it is a "drastic remedy" (*Matter of Spector v Allen*, 281 NY 251, 259), which is "sparingly to be used" (*Gompers v Bucks Stove & Range Co., supra*, at 450). As has been aptly stated by the Court of Appeals of Maryland, "the magnitude of its force demands care and discretion in use so as to avoid arbitrary, capricious or oppressive application of this power." (*State v Roll*, 267 Md 714, 717, 298 A2d 867, 870; *see also, Liner v State*, 62 Md App 381, 489 A2d 553, *cert denied* 303 Md 471, 494 A2d 939.) Thus, the court's ability to control the courtroom and to compel obedience to its lawful mandate (*see, State of New York v Congress of*

Racial Equality, 92 AD2d 815, 817) must be viewed not only in conjunction with the lawyer's duty to obey such mandate but also with the Judge's obligation to "Perform the Duties of His Office Impartially", without personal bias or prejudice (Code of Judicial Conduct Canon 3; *cf., Liner v State, supra*).

While petitioner did not comply with respondent's directive to "[g]et out of the well", there is no evidence in this record that he acted in a contumacious or insolent manner. His response was reasoned and measured as he attempted to frame the issue in a professional rather than personal perspective. Nor was his presence in the well in any way disruptive of the court's proceedings. To the contrary, the ability of a deputy bureau chief to confer on an on-going basis with his trial assistants facilities [sic] the workings of the court. The conduct upon which the contempt finding is based took place in a busy arraignment part in which assistant District Attorneys commonly come and go at will. Petitioner states that in his experience

assistant District Attorneys are generally permitted to "come and go" in the well and that he is "not aware of any order by Justice Berkman prior to May 23, 1990 restricting any [assistant District Attorney's] entry into the well of the courtroom in which she presides." Respondent does not deny that access by assistants was unrestricted prior to May 23, 1990; nor does she assert that on or after that date she restricted such access to anyone other than petitioner.

Furthermore, the record does not reflect any special circumstance -- other than respondent's personal animus -- which occasioned her directive. It seems clear that respondent's order to petitioner to "[g]et out of the well" emanated not from any necessity to maintain order and decorum in the courtroom but was, rather, an unwarranted and unreasonable overreaction to petitioner's efforts to obtain certain defendants' cooperation, efforts which respondent found offensive. It is noteworthy that on the day before the contempt finding was made, during proceedings which presented an issue concerning cooperation of defendants,

respondent had threatened to "have [petitioner] removed from [her] courtroom and barred for all time". Thus, respondent's order -- the culmination of a long-smoldering antagonism -- was a personal response to petitioner's mere presence and thereby lost the character of a lawful mandate. This is not a case of a lawyer's defiance of a "misguided and erroneous" ruling. (*Matter of Balter v Regan*, 63 NY2d 630, 631.) If petitioner's refusal to comply constituted a contempt, it was a contempt of the individual rather than the office.

BROSTOFF'S VERIFIED PETITION

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

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In the Matter of the Application of :
Assistant District Attorney
STEVEN BROSTOFF, :

Petitioner, :

For a judgment pursuant to Article 78 :
of the Civil Practice Law and Rules,
:

- against - :

CAROL BERKMAN, Acting Justice of the
Supreme Court, New York County, :

Respondent. :

----------x

The petitioner, Steven Brostoff, by his attorney, James M. McGuire, alleges:

PARTIES

1. Petitioner is an assistant district attorney in the Office of Robert M. Morgenthau, District Attorney of New

York County, assigned to the Office of the Special Narcotics Prosecutor.

2. Respondent Carol Berkman is an Acting Justice of the Supreme Court, in and for the County of New York.

NATURE OF RELIEF SOUGHT

3. This is an original proceeding brought pursuant to Article 78 of the Civil Practice Law and Rules seeking review and vacatur of a May 23, 1990 determination by respondent summarily adjudging petitioner to be guilty of criminal contempt of court and imposing a sentence of a fine of fifty dollars or, in the alternative, three days' imprisonment.

JURISDICTION AND VENUE

4. Pursuant to CPLR §7803(3) and Judiciary Law §§752 and 755, a proceeding lies to obtain review of judicial determinations summarily adjudicating persons to be in criminal contempt of court.

5. This proceeding is against an Acting Justice of the Supreme Court and the matter sought to be reviewed originated in New York County. Accordingly, this proceeding has been brought in the Appellate Division, First Judicial Department, in accordance with CPLR §506(b)(1).

SUMMARY OF PETITION

6. Respondent has developed a personal antipathy toward petitioner, apparently based in part on a wholly arbitrary disapproval of legitimate efforts by the Office of the Special Narcotics Prosecutor to combat the illegal drug trade by obtaining cooperation from certain defendants. Acting on that antipathy, respondent issued a capricious and unprecedented order to petitioner on May 23, 1990. Without any idea of or concern for the reason why petitioner had appeared in her courtroom, respondent observed petitioner in the well of that courtroom on routine and proper business and despite the absence of any inappropriate or even unusual behavior on petitioner's part she peremptorily directed petitioner to "[g]et out of the well."

7. Respondent had never previously prohibited an assistant district attorney from merely being in the well of her courtroom, and for this and other reasons petitioner believed that he was being directed to "get out" of respondent's courtroom altogether. He protested that he had a right to be in the courtroom. Respondent answered petitioner's single, brief protest with a challenge, decreeing that petitioner could leave the courtroom through the door to the holding pens for incarcerated defendants or through the courtroom's public doors. Unfortunately, although not surprisingly given respondent's behavior in virtually daring petitioner not to obey her unprecedented command to "get out," petitioner indicated that he would choose the door to the holding pens.

8. Respondent gave petitioner no opportunity whatsoever to defend against a finding of contempt. Rather, without more, respondent immediately adjudged petitioner to be guilty of criminal contempt of court and purported to find that petitioner had committed "disorderly, contumacious and

insolvent [sic] behavior." Notwithstanding that as a result of her own precipitous conduct respondent did not know of the legitimate reasons why petitioner was in the well of the courtroom, she further made the entirely inaccurate finding that petitioner "ha[d] no business being in the well of the courtroom."

9. Petitioner's criminal contempt conviction should be vacated for each of four independent reasons: first, because respondent's actions reflect an arbitrary and capricious abuse of the judicial contempt power; second, because respondent flouted the requirements of due process and the rules of this Court in failing to provide petitioner with a "reasonable opportunity" prior to being adjudicated in contempt "to make a statement in his defense or in extenuation of his conduct" (22 N.Y.C.R.R. § 604.2(b)); third, because petitioner's conduct did not rise to the level of a violation of Judiciary Law §750(A)(1), and the "exceptional and necessitous circumstances" required by §604.20(a) of this Court's rules were not present; and

fourth, respondent's "mandate of order" of contempt is fatally defective in its failure to set forth findings essential to a criminal contempt adjudication under §750(A)(1) of the Judiciary Law.

FACTUAL ALLEGATIONS

10. At present, and at all times relevant to this petition, defendants indicted for felony offenses are generally arraigned in one of three Supreme Court parts: Parts 30, 50 or 70. Although indictments brought by the New York County District Attorney's Office generally are assigned to IAS parts after one or two appearances in either Part 30, 50 or 70, narcotics indictments brought by the Office of the Special Narcotics Prosecutor generally remain in one of these three parts until they are trial ready.

11. An indictment is assigned to either Part 30, 50 or 70 in accordance with the trial bureau to which the assistant district attorney responsible for the indictment is assigned. Thus, Part 30 receives indictments brought by

prosecutors assigned to Trial Bureaus 30 and 60 of the New York County District Attorney's Office and Trial Bureau 30/60 of the Special Narcotics Prosecutor's Office; Part 50 receives indictments brought by prosecutors assigned to Trial Bureaus 40 and 50 of the New York County District Attorney's Office and Trial Bureau 40/50 of the Special Narcotics Prosecutor's Office; and Part 70 receives indictments brought by prosecutors assigned to Trial Bureaus 70 and 80 of the New York County District Attorney's Office and Trial Bureau 70/80 of the Special Narcotics Prosecutor's Office.

12. Until recently when she was reassigned to a trial part, but at all times relevant to this petition, respondent presided in Part 50. At all times relevant to this petition, petitioner has been the deputy chief of Trial Bureau 40/50 of the Special Narcotics Prosecutor's Office. In his capacity as deputy bureau chief, petitioner personally prosecutes narcotics indictments and supervises approximately eighteen assistant district attorneys assigned to his bureau. Thus,

petitioner appeared before respondent in Part 50 from time to time in connection with his own cases and those of the prosecutors he supervises.

13. The ability to obtain the cooperation of certain individuals charged with violating our narcotics laws provides the Office of the Special Narcotics Prosecutor with an important weapon in the war on drugs. Law enforcement officials, aided by cooperating defendants, can build and have built cases against others enlisted in the drug trade, particularly unsuspecting individuals operating at higher levels of drug-trafficking rings.

14. Respondent disapproves of the efforts made by petitioner and the office he represents to obtain cooperation from defendants. Commencing as of about February of 1990, respondent informed petitioner that she would not allow defendants to cooperate in her courtroom and once advised petitioner that defendants could cooperate "over [her] dead body."

15. To the extent respondent explained her disapproval of cooperation to petitioner, respondent stated in substance that someone has to go to jail for these crimes and that she was not running an auxiliary police force. By these remarks, respondent presumably meant to refer, respectively, to the fact that defendants who cooperate sometimes receive pleas to lesser offenses which permit probationary sentences in exchange for their cooperation, and to the fact that defendants who cooperate are sometimes cooperating while they are at liberty and working with regular police officers and other law enforcement personnel. In this latter regard, respondent once used a highly derogatory, scatological epithet to describe at least some cooperating defendants to another attorney and said that she would not put them "on the streets."

16. In early April of this year, petitioner and an agent of the Drug Enforcement Administration met with an attorney representing a young woman who had never previously been arrested but had been indicted for a

narcotics offense. This defendant -- who will be referred to herein as Jane Doe for her protection -- and her attorney wanted to cooperate with the authorities in the hope of receiving a favorable plea offer from the Office of the Special Narcotics Prosecutor and favorable court consideration. Jane Doe had been charged with a class A-1 felony offense and, absent cooperation, could not by law plead to an offense carrying less than a sentence of from three years to life imprisonment. For various reasons, including petitioner's belief that Jane Doe was being truthful in stating that she could implicate persons at high levels of a narcotics trafficking ring, petitioner determined that Jane Doe might be a suitable candidate for cooperation and might indeed be able to provide valuable assistance to the authorities.

17. During a bench conference before respondent at Jane Doe's arraignment, respondent purported flatly to forbid cooperation by Jane Doe, even though neither petitioner nor Jane Doe's counsel had even had an

opportunity to outline the reasons for the proposed cooperation. Respondent uses file cards, upon which she records salient information about cases, to keep track of cases. At the bench, in a manner designed to permit the attorneys to see what she was writing, respondent wrote on a card "plea or trial, no C." Indeed, evidencing the extreme nature of her views about cooperation, respondent warned petitioner that she had better not hear the "C-word" from his lips.

18. On this occasion, respondent also berated petitioner, informing him that she did not like the tactics of his office, that she was tired of his "games" and that unlike other judges respondent would not "play along." Turning to defense counsel, respondent made a disparaging refgerence to the abilities of the prosecutors in the office petitioner represents.

19. On another occasion, however, respondent did inform petitioner that she might permit a defendant to cooperate if the defendant had specific information about

individuals engaged in narcotics trafficking or about locations at which narcotics trafficking occurred.

20. In April of this year, for reasons unknown to petitioner, respondent apparently came to believe that petitioner was misinforming members of the defense bar about respondent's position with respect to cooperation. Respondent approached petitioner in Part 50 and informed him that he had "some nerve" telling attorneys that defendants could cooperate in her courtroom given that respondent had told petitioner that defendants could not cooperate. Neither on this nor on any other occasion did petitioner speak angrily or disrespectfully to respondent. Rather, petitioner simply and politely informed respondent that he had told defense attorneys who had inquired about the possibility of their clients cooperating that respondent had informed petitioner that she would not allow cooperation. Petitioner further stated that he had told defense attorneys that if they wished to pursue the subject, they would have to speak to respondent.

21. In contrast, respondent has referred to petitioner in highly derogatory terms. Indeed, notwithstanding her awareness that petitioner was the deputy chief of Trial Bureau 40/50, respondent made disparaging remarks about petitioner to assistant district attorneys whom petitioner supervises.

22. On May 22, 1990, a narcotics indictment for which petitioner was responsible -- which will be referred to herein to protect the defendant's safety as *People* v. *John Doe* -- appeared on the calendar in Part 50. Previously, after conferring with defense counsel who believed that it was in his client's best interests to cooperate, petitioner and a sergeant determined that John Doe might well be able to provide valuable assistance. On two prior occasions, respondent rebuffed defense counsel's efforts to explore with her the possibility of cooperation by John Doe and, on the second of these occasions, respondent would not allow counsel to approach the bench stating that she knew what he

wished to discuss. Petitioner, however, had never appeared before respondent in connection with John Doe.

23. As of May 22, 1990, petitioner did not yet possess the specific information from John Doe which petitioner believed that respondent was requiring before she would permit a defendant to cooperate, *see* ¶19, *supra*. Petitioner and defense counsel agreed that they would jointly request on May 22 that respondent sign an order directing the Department of Correction to produce John Doe and permit him to go to petitioner's office, so that petitioner and the sergeant could debrief John Doe in an effort to obtain specific information.

24. Accordingly, after the case was called, petitioner requested permission from respondent to approach the bench. As is reflected in the minutes (annexed hereto as Exhibit A but redacted to delete matter which might permit John Doe's identity to be ascertained), respondent issued the following threat:

> [Respondent]: It had better not be on your usual mission because if so I am going to have you removed from my courtroom and barred for all time. Do you still wish to approach?

25. When he heard the phrase "It had better not be on your usual mission," petitioner believed respondent to be saying that respondent did not want petitioner to approach and request that John Doe be paroled for the purpose of cooperating with the police. Prior to May 22, however, petitioner had never appeared before respondent in connection with *People* v. *John Doe*. In any event, petitioner and John Doe's counsel sought to approach for the more limited purpose of seeking the above-described order to produce and thus satisfy respondent's own requirements relating to specific information. Previously, moreover, respondent had never informed petitioner that she would not sign such an order to produce. Accordingly, albeit hesitantly in light of respondent's threat, petitioner stated "I think so"

in response to respondent's inquiry whether petitioner still wished to approach the bench.

26. Petitioner and John Doe's counsel thereupon approached the bench. As soon as the general subject of cooperation arose, before either petitioner or John Doe's counsel had an opportunity to state that they were seeking the order to produce, respondent ordered petitioner out of the courtroom:

> [Respondent]: Excuse me, Mr. Brostoff, get out of my courtroom I don't want you here. Excuse me step out please, forget it. I am not dealing with this. I am not in charge of an auxiliary police force.

27. The case was then adjourned and petitioner and defense counsel left the courtroom. As petitioner was exiting the courtroom, he heard respondent advise her court staff that she did not want petitioner in her courtroom any more and that petitioner should be kept out of her courtroom.

28. On May 23, 1990, petitioner received a telephone call from Assistant District Attorney Sherri Goldsmith, who was assigned to represent the Office of the Special Narcotics Prosecutor in Part 50 on that day. Ms. Goldsmith informed petitioner that a defendant in one of petitioner's own cases had been returned on a bench warrant, and Ms. Goldsmith also requested petitioner's file in that case.

29. In part because petitioner needed to appear in Part 30 (located on the same floor as Part 50) on another matter, petitioner decided to deliver the file to Ms. Goldsmith in Part 50. In addition, petitioner wished to be heard before respondent on the issue of the bail to be set on the defendant who had been returned on a bench warrant. And, although petitioner was mindful both of the threat respondent had made the day before and of respondent's comments to her court staff as petitioner was leaving the courtroom, respondent had not in fact purported to bar petitioner from her courtroom.

30. Accordingly, petitioner took the file to Part 50 and as he entered the courtroom he heard respondent tell her clerk to keep him out of the courtroom, and that she did not want him in there. Petitioner continued into the courtroom, entered the well area and stood behind the prosecution table in the place indicated by the letter "A" on the diagram annexed hereto as Exhibit B. The general practice, at least in parts functioning as calendar parts such as Parts 30, 50 and 70, is for assistant district attorneys to come and go in the well area of courtrooms. Indeed, not only do assistant district attorneys routinely enter the well area in order, for example, to deliver messages to the assistant district attorneys staffing the parts, but in fact the efficient operation of these parts virtually requires them to be free to enter the well area. In any event, to the best of petitioner's knowledge, prior to May 23, 1990 respondent had never issued any order or instruction restricting a prosecutor's access to the well of Part 50.

31. When petitioner entered the well, a bench conference was in progress on another matter. Immediately upon observing petitioner in the well, and without anything remotely like an interruption from petitioner, respondent herself abruptly interrupted those proceedings. As is reflected in the minutes, which are annexed hereto as Exhibit C, respondent did not trouble herself to ascertain why petitioner was in the well but instead, apparently still angry over the events of the day before, peremptorily directed petitioner to "[g]et out of the well."

32. As is evidenced by petitioner's subsequent comments (*see* ¶ 35, *infra*), because of the events of the preceding day, respondent's statements to her clerk as petitioner entered the courtroom on May 23 and because respondent had never before restricted an assistant district attorney's access to the well, petitioner believed that respondent was directing him to leave the courtroom altogether. Although petitioner refrained from responding in

terms as harsh or as uncivil as respondent's, petitioner protested respondent's command stating as follows:

> [Petitioner]: I have a right to be here I am a deputy chief of this bureau. I am entitled to check my cases.

33. Respondent, answered petitioner's brief protest with a challenge, virtually daring petitioner to disobey her unexplained command:

> [Respondent]: Get out of the well, you are not permitted to be in the well in my courtroom. Get in the audience. You either step out that way [indicating the courtroom's public doors] or that way [indicating the door to the holding pens] Mr. Brostoff.

34. Petitioner, who was then standing next to the prosecution table in the place indicated by the letter "B" on the diagram annexed hereto as Exhibit B, responded "I will go that way [indicating the door to the holding pens]." Evidencing her apparent satisfaction with the course of events, respondent stated "[v]ery good." Without according

petitioner the slightest word in his defense, she immediately found petitioner to be guilty of contempt.

35. Not having been permitted to speak at all on the question of guilt, petitioner was permitted to speak only briefly on the question of sentence. Evidencing his belief that he had been directed to leave the courtroom altogether, petitioner began by stating "I don't think there is any reason not to allow me in this courtroom." Respondent soon cut off an effort by petitioner to speak on his own behalf, directed that a mandate of contempt be written up and sentenced petitioner to three days' imprisonment or a fine of fifty dollars.

36. In the "mandate of order of contempt" (Exhibit D hereto), apparently relying on Judiciary Law §750(1), respondent purported to find that petitioner had committed "disorderly, contumacious and insolvent [sic] behavior." Notwithstanding that as a result of her own precipitous conduct respondent did not know and could not have known the legitimate reasons why petitioner was in the

well before she directed him to leave, respondent further drew the unfounded conclusion that petitioner "ha[d] no business being in the well of the courtroom." Respondent further found that "having been ordered out of the well, [petitioner] refused to leave on the court's order."

37. Thereafter, respondent continued to manifest her injudicious rancor toward petitioner. After petitioner left the courtroom on May 23, respondent referred to petitioner, in a comment to another assistant district attorney, with another unseemly scatological epithet.

38. The next day, May 24, Assistant District Attorneys Robert Silbering and Mark Dwyer appeared before respondent. As is reflected in the minutes, which are annexed hereto as Exhibit E, Mr. Silbering asked respondent to vacate the contempt adjudication and argued that respondent's actions were "arbitrary and capricious." Specifically, Mr. Silbering protested that "[t]he holding of [petitioner] in contempt for entering this court and going into the well of this court is an act taken by assistant district

attorneys dozens of times each day seems to me an arbitrary action on the part of the court." Notably, on this day many individuals were present in the well of the courtroom, including two casually-clad men, apparently police officers, who were lounging in the jury box.

39. Respondent then stated, "I am glad Mr. Silbering, I have had enough, I have had quite enough. I am glad you have given me the chance to expand on this record."

40. Although respondent did not of course deny that prosecutors routinely enter the well, respondent proceeded to distort what had transpired on the prior days. Specifically, respondent claimed that on May 22 she had told petitioner that he should not approach with defense counsel "if he wanted to approach on the same application that had been made many times before and rejected by the Court...." Respondent went on to claim that petitioner "chose to step up and made the same application that had been made previously many, many times to the Court in the same case

and I *asked* him to leave" (emphasis added). In fact, as set forth in ¶¶ 23, 25, *supra*, petitioner's purpose in approaching the bench on May 22 was not to ask respondent to parole John Doe or otherwise acquiesce in his cooperation but was to seek from respondent an order to produce. As set forth in ¶ 22, *supra*, petitioner had never appeared before respondent and made any application in that case. *People* v. *John Doe*. And as set forth in ¶ 26, *supra*, respondent never gave petitioner or John Doe's counsel an opportunity at the bench to apprise respondent of the nature of the joint application before summarily *ordering* petitioner to leave her courtroom.

41. With respect to the events of May 23, respondent stated that, before she advised petitioner that he could leave the courtroom through either the door to the holding pens or the public door, she twice ordered petitioner out of the well and that petitioner twice "refused to go." Moreover, respondent attributed to petitioner an arrogant statement that petitioner never made when respondent

claimed that petitioner had stated "he was an assistant bureau chief and he could go wherever he liked in this court."

42. Respondent's faulty recollection of the events of the preceding days appears to reflect her antipathy toward petitioner; it does not accord with the facts. Petitioner was not twice ordered to leave, petitioner did not twice refuse to leave before respondent challenged him to disobey her command and petitioner never arrogantly insisted that "he could go wherever he liked in [the] court." Respondent did, however, concede that she could not permanently ban petitioner from her courtroom, thus ironically conceding that petitioner would be within his rights to protest if (as he did) he understood her abrupt order on May 23 to be a directive that he not remain in the courtroom.

43. After respondent seized the opportunity to expand the record with a lengthy and inaccurate statement of her own, the proceedings terminated. Respondent would not permit Mr. Silbering to speak further. Thereafter, the

Special Narcotics Prosecutor, Sterling Johnson, personally paid the fifty dollar fine imposed on petitioner.

44. On or about June 21, two of petitioner's attorneys went to Part 50 to present respondent with a notice of motion and accompanying memorandum of law (annexed hereto collectively as Exhibit F) seeking an order vacating the contempt adjudication. The notice of motion (which contained as its first document an affirmation by petitioner) and memorandum of law were passed up to respondent, who was at the bench. In what could only have been a reference to petitioner's affirmation, respondent -- in a voice loud enough to be heard by petitioner's attorneys, who were seated in the front row of the courtroom -- twice proclaimed the affirmation to be perjurious before tossing the moving papers aside to be returned to petitioner's attorneys.*

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*Later that day, petitioner's law secretary telephoned one of petitioner's attorneys and requested that a copy of the papers again be delivered to the court. Petitioner's attorney complied with this request and eventually brought on the motion before respondent. By a written decision dated August 3, 1990 (Exhibit G hereto), respondent denied the motion.

45. Respondent's animosity toward the office petitioner represents and its efforts to obtain cooperation from defendants is further exhibited by an extraordinary written opinion issued by respondent in another case. In that case, *People* v. *J.L.*, N.Y.L.J., August 10, 1990, p. 18, cols. 2-3 (a copy of the opinion is annexed hereto as Exhibit H), respondent held that courts were without authority to direct that an incarcerated defendant be produced on consent and taken to the prosecutor's office for investigative purposes such as determining whether the defendant would be a suitable candidate for cooperation. After so holding, respondent saw fit to add in the final paragraph of her opinion a wholly gratuitous suggestion that prosecutors would like to commit illegal acts and thus might well "chafe" at her holding.

46. Further evidencing that her May 23 directive to "get out of the well" was an *ad hoc* one prompted by her anger at petitioner, is the fact that after May 23 respondent never restricted an assistant district attorney from entering

the well of her courtroom. Indeed, petitioner appeared in the well at least twice after May 23 and respondent did not again order him out of the well.

47. Petitioner has made no prior application before this Court for the relief sought herein.

WHEREFORE, for the reasons stated herein and in the accompanying memorandum of law, petitioner respectfully requests that this Court issue a judgment vacating respondent's May 23, 1990 "mandate of order of contempt" adjudicating petitioner in criminal contempt of court, directing remittal of the fine and Court granting such other relief as may seem just and proper.

Date: New York, New York
September 21, 1990

Respectfully submitted,

ROBERT M. MORGENTHAU
District Attorney
New York County
Attorney for Petitioner
One Hogan Place
New York, New York 10013

James M. McGuire
Assistant District Attorney
Of Counsel

VERIFICATION

JAMES M. McGUIRE, an attorney duly admitted to the practice of law in the courts of this State, affirms under penalties of perjury that he appears as counsel in this proceeding for Petitioner Steven Brostoff; that he has read the foregoing Petition and knows the contents thereof; that the allegations therein are based upon personal knowledge, or upon information and belief, the sources of that information being sworn statements from and conversations with Assistant District Attorneys Steven Brostoff and Sherri Goldsmith, conversations with Sterling Johnson, the Special Narcotics Prosecutor, conversations with Assistant District Attorneys Mark Dwyer and Robert Silbering, former Assistant District Attorney Deirdre Roney, conversations with other assistant district attorneys and defense attorneys, and the exhibits appended to the Petition, all of which he believes to be true and accurate.

Dated: New York, New York
September 21, 1990

s/
JAMES M. McGUIRE